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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-287

No. ~~1832~~

ROBERT E. JACKS,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

ROBERT E. JACKS,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY

Petitioner prays that a Writ of Certiorari issue to review the decision and order in this cause of the Superior Court of New Jersey, Law Division, Middlesex County.

Opinion Below

The decision and order of the Law Division of the Superior Court of New Jersey, sought to be reviewed are set forth in the appendix to this petition at pp. 6a-15a.

The order of the Appellate Division of the Superior Court of New Jersey, denying petitioner leave to appeal from the order of the Law Division of the Superior Court, and the order of the New Jersey Supreme Court, which also denied leave to appeal, appear in the appendix at pp. 3a-5a.

Jurisdiction

The order of the Law Division of the Superior Court, of New Jersey, Middlesex County, was entered on December 8, 1969. The order of the Appellate Division of the Superior Court of New Jersey, denying leave to appeal, was filed January 7, 1970. The order of the New Jersey Supreme Court denying leave to appeal is dated March 22, 1971.

The jurisdiction of this Court to review this case by Petition for Writ of Certiorari is based upon 28 U.S.C. §1257 (3). The order of the Law Division of the Superior Court is a final order in a separate matter, independent and collateral to the merits of the case, and presents substantial issues, the consideration of which, by this Court should not be deferred. See *Local No. 438* v. *Curry,* 371 U. S. 542 (1963); *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U. S. 541 (1949); *Mercantile National Bank* v. *Langdeau,* 371 U. S. 555 (1963).

The Questions Presented

1. In light of this Court's decision in *Benton* v. *Maryland,* 395 U.S. 784 (1969), should the dual sovereignty doctrine continue to be invoked as justification for successive federal and state criminal prosecutions for the same conduct?

2. Assuming, but not conceding, the continuing validity of the dual sovereignty doctrine, may federal and state prosecutors, in light of *Houston* v. *Moore*, 18 U.S. (5 Wheat.) 1 (1820) and *Bartkus* v. *Illinois*, 359 U.S. 121 (1959) pursue successive prosecutions of the same individual, for the same offense, violative of the same or similar statutes?

Constitutional and Statutory Provisions

Constitution: Amendment V.

To the extent here pertinent, the Fifth Amendment provides: "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *".

Statutes:

18 U.S.C. §1952 provides:

> *"Interstate and foreign travel or transportation in aid of racketeering enterprises"*
>
> "(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce including mail, with intent to—
>
> "(1) distribute the proceeds of any unlawful activity; or
>
> "(2) Commit any crime of violence to further any unlawful activity; or
>
> "(3) Otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carry-

ing on of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal Excise Tax has not been paid, narcotics *or controlled substances (as defined in Section 102(6) of the Controlled Substances Act)* or prostitution in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery or arson in violation of the laws of the State in which committed or of the United States.

"(c) Investigations of violations under this section involving liquor [or narcotics] shall be conducted under the supervision of the Secretary of the Treasury." [The emphasized language was added to subparagraph (b) and the bracketed language was deleted from subparagraph (c) by Pub. L. 91-513, Title II, §701(i)(2), Oct. 27, 1970, 84 Stat. 1282.]

N.J.S. 2A:93-6 provides:

"Giving or accepting bribes in connection with government work, service, etc."

"Any person who directly or indirectly gives or receives, offers to give or receive, or promises to give or receive any money, real estate, service or

thing of value as a bribe, present or reward to obtain, secure, or procure any work, service, license, permission, approval or disapproval, or any other act or thing connected with or appertaining to any office or department of the government of the state or of any county, municipality or other political subdivision thereof, or of any public authority, is guilty of a misdemeanor."

N.J.S. 2A:105-1 provides:

"Unlawful Takings"

"Any judge, magistrate or public officer who, by color of his office, receives or takes any fee or reward not allowed by law for performing his duties, is guilty of a misdemeanor."

N.J.S. 2A:85-1 provides:

"Offenses indictable at common law and not otherwise, covered, punishable as misdemeanors"

"Assaults, batteries, false imprisonments, affrays, riots, routs, unlawful assemblies, nuisances, cheats, deceits and all other offenses of an indictable nature at common law, and not otherwise expressly provided for by statute are misdemeanors."

Statement of the Case

Petitioner, Robert E. Jacks, is a defendant in two pending criminal cases, one in the Federal Court and another in the Superior Court of New Jersey. The federal prosecution was instituted first, by the filing of an indictment, in the United States District Court for the District of New Jersey. It was followed by the Superior Court pro-

ceedings which were commenced by filing three indictments in Middlesex County, New Jersey. All indictments, federal and state, are based upon the same conduct attributed to Jacks and alleged to be criminal. The federal indictment alleges a violation of N.J.S. 2A:93-6, a statute punishing bribery, as does one of the state court indictments. The two remaining state court indictments also charge bribery involving the same alleged conduct, but under different statutes also punishing this crime, N.J.S. 2A:105-1 and N.J.S. 2A:85-1.

The federal indictment, containing nine counts, was returned on February 23, 1967. Named as defendants therein were Jacks, a public official of the Township of Woodbridge, New Jersey, Walter Zirpolo, the Mayor of Woodbridge, The Colonial Pipeline Company, the builder of a petroleum pipe line, three of Colonial's officers, and four of Colonial's corporate subcontractors. The federal indictment alleged that defendants had engaged in "unlawful activity," in violation of N.J.S. 2A:93-6, in that Colonial and its officers, with assistance from the defendant subcontractors, had paid, and Zirpolo and Jacks had accepted bribes to facilitate acquisition of a building permit and pipe line easements in Woodbridge.

Federal jurisdiction was predicated upon allegations in the indictment, that the defendants' conduct had involved conspiratorial (Counts I and VI) and substantive (Counts II to V and VII to IX) violations of 18 U.S.C. §1952 in that the defendants had traveled in and used or had caused others to travel in and use the facilities of interstate commerce. However, travel in interstate commerce or the use of its facilities, without more, does not amount to a violation of 18 U.S.C. §1952. In addition there must be an intent to engage in "unlawful activity" (in this case the violation of N.J.S. 2A:93-6), and conduct amount-

ing to the attempted or actual performance of such unlawful activity. Thus, in the federal indictment, the alleged violation of N.J.S. 2A:93-6 was an essential ingredient of the crimes charged therein.

After a ten week trial in the United States District Court, Jacks was found guilty of Counts I and VI in the Federal indictment, which charged conspiracies and of Count VII, which charged a single substantive offense. He was acquitted in respect to the remaining six counts in the indictment, all alleging separate substantive charges. The evidence adduced at trial showed clearly that Jacks had not travelled in or used the facilities of interstate commerce, or that he even had knowledge that the conduct of other defendants involved interstate activity. The evidence that he had caused others to engage in such activity was minimal, vague and equivocal.

On Appeal to the Court of Appeals for the Third Circuit, Jacks' conviction was reversed because the Grand Jury which had returned the federal indictment was found to have been improperly selected. The United States has petitioned the Third Circuit, for an *en banc* rehearing of the judgment of reversal. This petition is pending and undetermined.

On February 3, 1969, two weeks after the verdict in the United States District Court, the three state court indictments were filed. The first of these indictments (No. 69-187) contains seven counts which are practically a verbatim reproduction of seven counts in the federal indictment. Along with Jacks, this state indictment names as defendants all individuals and corporations who were charged as defendants in the federal indictment, except Glenn H. Giles, an officer of Colonial. Early during the trial in the Federal Court, Giles received a grant of im-

munity and became the principal prosecution witness. This state indictment, employing language substantially identical to the language in the federal indictment, charges Jacks with participation in the same two conspiracies, commission of the same five substantive violations of N.J.S. 2A:93-6, and with having engaged in the same conduct as alleged in seven counterpart counts of the federal indictment.

The only material points of difference between the federal indictment and this state indictment are as follows: The federal indictment contained nine counts and the state indictment contains seven counts, omitting two of the substantive counts set forth in the federal indictment, presumably because prosecution of these omitted counts has been barred at state level by the running of the New Jersey Statute of Limitations. The state indictment does not charge any violation of federal law, nor does it in its five substantive counts allege any interstate activity. However in its two conspiracy counts which mirror the two conspiracy counts in the federal indictment, it alleges the same acts of interstate movement.

The second state indictment (No. 69-188) also contains seven counts, names only Jacks and Zirpolo as defendants and charges two conspiratorial and five substantive violations of N.J.S. 2A:105-1. Except for these differences, the second state indictment alleges the same conduct and transactions and uses practically the same verbiage as does the first state indictment and, therefore, to the extent indicated, it too bears the same resemblance to the federal indictment. The charge of violations of N.J.S. 2A:105-1, in the second state indictment involved no departure from the preoccupation with bribery in violation of N.J.S. 2A:93-6, found in both the federal indict-

ment and in the first state indictment. N.J.S. 2A:105-1, dealing with public officials as a separate class, also condemns bribery. See *State* v. *Begyn,* 34 N. J. 35, 167 A. 2d 161 (1961).

The third state indictment (No. 69-180) contains five counts and is directed exclusively against Jacks. It alleges that he committed five substantive offenses involving the same conduct and transactions as were charged in Counts IV, V, VII, VIII and IX of the federal indictment. While each of the five counts generally alleges that Jacks was guilty of misconduct in office, in violation of N.J.S. 2A:85-1, again, as in the counterpart counts of the federal indictment, the actual offenses charged are bribery. See *State* v. *Begyn, supra.*

In the Law Division of the Superior Court, Jacks applied by motion (App. 16a *et seq.*) for the dismissal of the three state indictments, asserting that he had been tried in the United States District Court for offenses involving the same conduct and transactions as were charged in the state indictments, and that a continuance of the state court prosecution would expose him to double jeopardy in violation of the Fifth Amendment to the United States Constitution. This application, along with similar applications filed by co-defendants in the state court, were denied notwithstanding that the Court found that in "all essential respects, save the loss of some counts through passage of time, the state indictments charge the defendants with unlawful conduct arising out of the same facts" as were covered by the federal indictment. However, the Law Division of the Superior Court held, we submit erroneously, that the same criminal conduct, if offensive to both federal and state laws, by reason of the doctrine of dual sovereignty, could be made the subject of successive prosecutions by the United States and the State of New Jersey. As previ-

ously noted, both the Appellate Division of the New Jersey Superior Court and the Supreme Court of New Jersey, denied leave to appeal from the order of the Law Division embodying this determination. Subsequently, on April 7, 1971, the Supreme Court of New Jersey, by order, stayed proceedings in the State Court until May 17, 1971 on condition that the State Court defendants would make application to this Court for a further stay within ten days of the date of the mentioned order (App. p. 2a). A timely application for such a further stay was made and was denied by Mr. Justice Brennan on April 23, 1971 (App. p. 1a). This petition ensued.

ARGUMENT

POINT I

The dual sovereignty doctrine should no longer be invoked to justify successive federal and state court prosecutions for the same conduct.

The notion that an individual can be punished or exposed to the potential for punishment more than once for the same conduct is offensive to common decency. This Court in *Benton* v. *Maryland,* 395 U. S. 784 (1969), overruled *Palko* v. *Connecticut,* 302 U. S. 319 (1937), and held that the Fifth Amendment guarantee against double jeopardy, binding upon the federal government, is a fundamental right which the states are also required to extend to state court defendants by virtue of the due process clause of the Fourteenth Amendment. In the past, however, successive federal and state court prosecutions for the same conduct have been permitted. See *Bartkus* v. *Illinois,* 359 U. S. 121 (1959); *Abbate* v. *United States,*

359 U. S. 187 (1959); *United States* v. *Lanza,* 260 U. S. 377 (1922).

If successive prosecutions, for the same conduct, are offensive when pursued by the same sovereign, they are no less offensive when pressed by two sovereigns in the same federal system. Successive federal and state court prosecutions for the same conduct are barbaric and have no place in any civilized system of jurisprudence.

Bartkus, supra, sought to justify successive federal and state court prosecutions for the same conduct on two primary grounds: (1) The Fifth Amendment guarantee against double jeopardy, binding upon the Federal Government, was not a right so fundamental in nature as to be obligatory upon the states, by virtue of the Fourteenth Amendment; (2) the same conduct may violate both federal and state law, and if so, each of these sovereigns, under the doctrine of dual sovereignty, was entitled to seek vindication for the breach of its own law in separate prosecutions.

The first of the major supports for the *Bartkus* holding was eliminated by *Benton* v. *Maryland, supra.* The second support, the dual sovereignty doctrine, in the context here involved, is an abstraction, which now should be weighed and balanced against the real and immediate plight of the individual, who is once punished or exposed to punishment at trial in the Federal Court, and is later compelled to undergo additional expense, agony and embarrassment, and further punishment or the risk of further punishment in a state court prosecution. When so weighed and balanced, the dual sovereignty doctrine should yield to the individual's right of repose.

Indeed, once *Benton* held that the constitutional guarantee against double jeopardy is a right which the states

must afford defendants in state courts, the dual sovereignty doctrine no longer suffices as a prop to justify successive federal and state prosecutions for the same conduct. This has been the result in other but cognate areas. Previously *Feldman* v. *United States*, 322 U. S. 487 (1924) and *Knapp* v. *Schweitzer*, 357 U. S. 371 (1958), paying deference to the dual sovereignty doctrine, held, in effect, that self-incriminating testimony from a witness before an agency of one sovereign, under a grant of immunity given to him by that sovereign, could be used against him in a prosecution pursued by the other sovereign. Subsequently, *Malloy* v. *Hogan*, 378 U. S. 1 (1964) held that the Fifth Amendment guarantee against self-incrimination was obligatory upon the states. Immediately, *Murphy* v. *Waterfront Commission*, 378 U. S. 52 (1964), abandoned the dual sovereignty doctrine in the field of self-incrimination and held that one sovereign could not compel testimony by a grant of immunity, if the grant were not sufficiently broad to prevent incrimination in the courts of the other sovereign. *Wolf* v. *Colorado*, 338 U. S. 25 (1949) held that the Fourth Amendment guarantee against unreasonable searches and seizures was binding upon the states. After this foundation was laid, the dual sovereignty doctrine fell in *Elkins* v. *United States*, 364 U. S. 206 (1960), which holds that evidence unlawfully seized by the officers of one sovereign cannot be used in a prosecution maintained by the other sovereign. See also *Mapp* v. *Ohio*, 367 U. S. 643 (1961).

The Ohio Court of Appeals, after reading *Benton*, has recently held, in a case involving a factual situation closely approximating the *Bartkus* facts, that successive federal and state court prosecutions for the same conduct violates double jeopardy. *State* v. *Fletcher*, 22 Ohio App. 2d 83, 259 N. E. 2d 146 (1970). Such a determination is the logical and unescapable sequel to the *Benton* decision. Justice requires no less.

POINT II

Even if the dual sovereignty doctrine remains applicable, successive federal and state prosecutions charging that the same conduct violates the same or similar statutes offends the guarantee against double jeopardy.

The rationale of the dual sovereignty doctrine, as employed to permit successive federal and state prosecutions, is that the same conduct may amount to separate violations of separate laws of each sovereign. See *United States* v. *Lanza*, 260 U. S. 377, 382 (1922). The *Bartkus* opinion (at 359 U. S. 130), however, commenting upon *Houston* v. *Moore*, 18 U. S. (5 Wheat.) 1 (1829), indicated that a plea of double jeopardy should bar successive state and federal prosecutions in situations involving violations of the same statute. The case at bar is that kind of situation.

Violation of N.J.S. 2A:93-6 was an essential ingredient of the crimes charged in the federal indictment. It was the claimed "unlawful activity" which is also an essential ingredient of 18 U.S.C. §1952, the basis of federal jurisdiction in the federal prosecution. That this was so is manifested by the fact that the Judge of the United States District Court, in his instructions to the jury, charged the elements of the crime of bribery, the offense proscribed by N.J.S. 2A:93-6. A prosecution is subject to the bar of double jeopardy, if the defendant is charged with an offense which was a constituent ingredient of a crime alleged against that defendant in an earlier prosecution. *Grafton* v. *United States*, 206 U. S. 333 (1907).

One of the state indictments specifically alleges violations of the same N.J.S. 2A:93-6. Accordingly, prosecution of this indictment, alleging a crime which was a con-

stituent ingredient of the crime charged in the earlier federal indictment should be barred. The same applies to the remaining state indictments which charge bribery, under different state statutes, N.J.S. 2A:105-1 and N.J.S. 2A:85-1. The nature of the crime charged in a subsequent prosecution, rather than its statutory nomenclature, is the test of double jeopardy. *Grafton* v. *United States, supra.* Multiple prosecutions for the same conduct under different statutes is also offensive to the guarantee against double jeopardy. See *Gore* v. *United States,* 357 U. S. 386 (1958) dissenting opinion; *Abbate* v. *United States,* 359 U. S. 187, 196 (1959) opinion of Mr. Justice Brennan.

Conceding for argument's sake only that the dual sovereignty doctrine continues to justify successive federal and state prosecutions for the same conduct, that doctrine, nevertheless, does not justify multiple prosecutions, based upon the same conduct and the violation of the same or like statutes.

POINT III

Notwithstanding the judgment of reversal in the Third Circuit Court of Appeals, petitioner was exposed to jeopardy; this Court should grant immediate review.

The invalidation of the federal indictment by the Third Circuit Court of Appeals should not detract from petitioner's right to invoke the protection of the double jeopardy guarantee in the state prosecution. Petitioner was acquitted of charges in six counts of the federal indictment. A verdict of acquittal affords the basis for a valid plea of double jeopardy, even if returned after the trial of charges in an invalid indictment. *Benton* v.

Maryland, supra; United States v. *Ball,* 163 U. S. 662 (1896); see also *Price* v. *Georgia,* 398 U. S. 323 (1970). The offenses alleged in four of the substantive counts of the federal indictment, as to which petitioner received verdicts of acquittal, have been made the subject matter of charges in all three state indictments. The state should be barred from trying these charges.

Nor may it be said that petitioner was not in jeopardy in the Federal Court in respect to the charges set forth in the three counts in the federal indictment as to which convictions were returned, on the ground that these convictions were reversed because the federal indictment was invalid. As indicated in *Benton, supra,* an indictment, returned by an improperly empaneled grand jury is voidable until reversed upon appeal, and jeopardy does attach to the trial of that indictment before reversal takes place. Decisions dealing with the right of the government to re-indict in such cases (Jacks does not concede that such a right exists in the case at bar) also bespeak the existence of jeopardy prior to reversal. Re-indictment is justified on the grounds of a "continuing jeopardy", that could only have had its origin prior to reversal. See *Price* v. *Georgia,* 398 U. S. 323 (1970); *Green* v. *United States,* 355 U. S. 184 (1957); *United States* v. *Jorn,* 400 U. S. 470 (1971).

An understanding of the nature of the guarantee against double jeopardy militates for a determination that petitioner was exposed to jeopardy in respect to those counts in the federal indictment which were reversed by the Third Circuit. The guarantee is not only a bar to double punishment. It is also a bar to multiple prosecutions, to the hazard or potential of double punishment, and to a repetition of the anxiety, embarrassment and insecurity attendant to a second trial for the same conduct. *State* v. *Ball; Price* v. *Georgia; Green* v. *United States, supra;*

United States v. *Jorn, supra,* at 400 U. S. 479 (1971). Petitioner has already had an ordeal of anxiety, embarrassment and insecurity in the Federal Court and should not be made to experience it again in the state court.

The last mentioned considerations also militate for immediate review of the order denying his plea of double jeopardy. If review is delayed and petitioner is forced to endure a trial in the state court, he will, in substantial measure, be denied the guarantee against double jeopardy.

CONCLUSION

For the foregoing reasons, the order of the Superior Court of New Jersey, denying petitioner's plea of double jeopardy was erroneous and a writ of certiorari to review that order should be granted.

Respectfully submitted,

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APPENDIX

Notice of Denial of Application for Stay by the Supreme Court of the United States

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D. C. 20543

E. ROBERT SEAVER
Clerk of the Court

April 23, 1971

John E. Toolan, Esq.
214 Smith Street
Perth Amboy, New Jersey 08861

RE: ROBERT E. JACKS v. NEW JERSEY
October Term, 1970

Dear Mr. Toolan:

Your application for stay and the opposition thereto in the above-captioned cause were presented to Mr. Justice Brennan, who has today denied such application.

Very truly yours,

E. ROBERT SEAVER, Clerk
By ROBERT N. BOYER
Robert N. Boyer
Assistant

RNB:jmh

cc: The Honorable George F. Kugler, Jr.
Attorney General of New Jersey
State House Annex
Trenton, New Jersey 08625

Order of Supreme Court of New Jersey Denying Stay

(Filed—April 7, 1971)

SUPREME COURT OF NEW JERSEY
M-212 SEPTEMBER TERM 1970

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

WALTER ZIRPOLO,

Defendant-Appellant.

This matter having been duly presented to the Court, it is Ordered that motion is denied but stay is granted until May 17, 1971 on condition that application for further say is filed with the Clerk of the United States Supreme Court within 10 days from date hereof.

WITNESS, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 7th day of April, 1971.

IRVING B. ZEICHNER
Acting Clerk

Order of Supreme Court of New Jersey Denying Leave to Appeal

(Filed—March 22, 1970)

SUPREME COURT OF NEW JERSEY

M-168 SEPTEMBER TERM, 1969

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

WALTER ZIRPOLO, *et al.*,

Defendants-Appellants.

ROBERT E. JACKS

This matter having been duly presented to the Court, it is Ordered that motion for Leave to Appeal is denied.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this twenty-second day of March, 1971.

IRVING B. ZEICHNER
Acting Clerk

Order of Appellate Division of Superior Court Denying Leave to Appeal

(Filed—January 7, 1970)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. AM-95-69

MOTION NO. M-346-69

BEFORE PART D

THE STATE OF NEW JERSEY

vs.

WALTER ZIRPOLO, ROBERT E. JACKS, COLONIAL PIPELINE CO., KARL T. FELDMAN, BEN D. LEUTY, ROWLAND TOMPKINS CORP., BECHTEL CORP., GATES CONSTRUCTION CORP., GATES EQUIPMENT CORP.,

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Moving Papers Filed December 23, 1969

Date Submitted to Court January 5, 1970

Date Decided January 6, 1970

ORDER

This matter having been duly presented to the Court, it is hereby ORDERED as follows:

Motion for Leave to Appeal Denied

/s/ VICTOR S. KILKENNY P. J. A. D.

Order of Appellate Division of Superior Court Denying Leave to Appeal

Witness, the Honorable Victor S. Kilkenny, Presiding Judge of Part D, Superior Court of New Jersey, Appellate Division, this 6th day of January 1970.

MORTIMER S. NEWMAN, JR.
Clerk of the Superior Court

Order of Law Division of Supreme Court

(Filed—December 8, 1969)

NEW JERSEY SUPERIOR COURT
MIDDLESEX COUNTY—LAW DIVISION
(CRIMINAL)
Nos. 69-187, 188, 190

THE STATE OF NEW JERSEY,

vs.

WALTER ZIRPOLO, ROBERT E. JACKS, COLONIAL PIPELINE COMPANY, KARL T. FELDMAN, BEN D. LEUTY, ROWLAND TOMPKINS CORPORATION, BECHTEL CORPORATION, GATES CONSTRUCTION CORPORATION, GATES EQUIPMENT CORPORATION,

Defendants.

This matter having been opened to the Court by various counsel representing all of the afore-mentioned defendants except Walter Zirpolo, and the State having been represented by Edward J. Dolan, Prosecutor of Middlesex County (J. Norris Harding, Assistant Prosecutor, appearing), and the Court having had an opportunity to consider the briefs and affidavits submitted as well as the oral arguments presented;

It is, on this eighth day of December, 1969, ORDERED and ADJUDGED that the motions made by respective coun-

sel for all the defendants except defendant Walter Zirpolo, for dismissal of the above indictments, based upon double jeopardy and/or collateral estoppel, be and the same are hereby dismissed for the reasons fully stated in the court's oral opinion delivered in open court on October 31, 1969, as by the record will more fully appear.

LEON GEROFSKY, A. J. S. C.

I hereby consent to the form of the within Order.

WILENTZ, GOLDMAN & SPITZER
Attorneys for Colonial Pipeline Company
By WARREN W. WILENTZ

TOOLAN, ROMOND & BURGESS
Attorneys for Robert E. Jacks
By JOHN E. TOOLAN

SHANLEY & FISHER
Attorneys for Bechtel Corporation
By THOMAS CAMPION

BROWER, BRILL & GANGEL
Attorneys for Rowland Tompkins Corporation
By JOSEPH E. BRILL

PAUL, WEISS, GOLDBERG, RIFKIND, WHARTON & GARRISON
Attorneys for Ben D. Leuty
By SIMON H. RIFKIND

PINDAR, MCELROY, CONNELL, FOLEY & GEISER
Attorneys for Karl T. Feldman
By ADRIAN FOLEY

VAN RIPER, BELMONT & VILLANUEVA
Attorneys for Gates Equipment Corp. and Gates Construction Corp.
By WALTER VAN RIPER

Oral Decision of Gerofsky, A. J. S. C. (October 31, 1969)

NEW JERSEY SUPERIOR COURT
MIDDLESEX COUNTY—LAW DIVISION

(CRIMINAL)

Nos. 69-187, 188, 190

THE STATE OF NEW JERSEY,

vs.

WALTER ZIRPOLO, ROBERT E. JACKS, COLONIAL PIPELINE COMPANY, KARL T. FELDMAN, BEN D. LEUTY, ROWLAND TOMPKINS CORPORATION, BECHTEL CORPORATION, GATES CONSTRUCTION CORPORATION, GATES EQUIPMENT CORPORATION,

Defendants.

Middlesex County Court House
New Brunswick, New Jersey
October 31, 1969

Before:

HONORABLE LEON GEROFSKY, A. J. S. C.

Appearances:

EDWARD J. DOLAN, Prosecutor
By J. NORRIS HARDING, Assistant Prosecutor
For the State.

TOOLAN, ROMOND & BURGESS, ESQS.
By ARTHUR W. BURGESS, ESQ.,
For Defendant Jacks.

Oral Decision of Gerofsky, A. J. S. C.
(October 31, 1969)

WILENTZ, GOLDMAN & SPITZER, ESQS.
By WARREN W. WILENTZ, ESQ.,
For Defendant Colonial Pipeline.

PAUL, WEISS, GOLDBERG, RIFKIND,
WHARTON & GARRISON
By SIMON H. RIFKIND, ESQ.,
For Defendant Leuty.

PINDAR, MCELROY, CONNELL, FOLEY &
GEISER, ESQS.
By ADRIAN M. FOLEY, JR., ESQ.,
For Defendant Feldman.

SHANLEY & FISHER, ESQS.
By THOMAS F. CAMPION, ESQ.;
For Defendant Bechtel Corporation.

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(2)* The Court: Gentlemen, I have listened to all the argument here, after having devoted much time during the summer and since then to the briefs filed in this matter, and I am ready to call it. As I say, all of you rely upon your brief, and I have read them, studied them, familiarized myself with all of the authorities recited therein.

The defendants here, other than the defendant, Zirpolo, have moved this Court for an order dismissing the in-

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* All figures in parentheses indicate the number of each new page of the stenographic transcript.

dictments against them on the ground that trial in this Court would place them twice in jeopardy, and on the additional ground, raised by defendant, Leuty, that the State is collaterally estopped from prosecuting them. Today Leuty suggests an additional ground, a further ground that the Court should exercise supervisory power to bring to a halt this prosecution. That, though not specifically briefed, is summed up by my observation that it constitutes nothing more than that this Court should let its heart rule its head.

The defendants were first indicted in the United States District Court of New Jersey. They were charged, in many counts, with conspiring to violate and violating 18 U.S.C. code section 1952 by using or causing others to use facilities in interstate commerce to promote, manage, establish, carry on and facilitate unlawful activity, to (3) wit, violations of New Jersey's bribery statute, N.J.S. 2A:93-6. A trial was held and various judgments of convictions and acquittal were entered on jury verdicts. The judgments of conviction are presently under appeal.

The Middlesex County Grand Jury subsequently indicted the same defendants. In all essential respects, save the loss of some counts through passage of time, the State indictments charge the defendants with unlawful conduct arising out of the same facts. The only substantive difference is that the State indictments do not charge that the conduct of the defendants was interstate.

The defendant, Jacks, has also moved for dismissal of indictments in which he alone is charged with extortion and misconduct in public office. He has not submitted

a brief and is apparently relying on the briefs of other counsel. I assume that his position, for the purposes of this motion, is similar to that of the other defendants; however, any argument offered by the other defendants regarding the similarity of identity of offenses charged in the State and Federal indictments cannot serve any useful purpose here.

I turn to the argument that the indictments must be dismissed on the ground that trial in this Court would place them twice in jeopardy. The controlling authority on the issue of consecutive federal and state prosecutions (4) as placing a defendant twice in jeopardy, on both federal and state constitutional levels, is *State* v. *Cooper,* 54 New Jersey 330 (1969). In that case the New Jersey Supreme Court upheld prosecution of the defendant under both federal and state weapons statutes which were almost identical. In reaffirming the "dual sovereignty" theory announced in *Bartkus* v. *Illinois,* 359 U. S. 121, and other citations, the Court pointed out the ideological differences between the federal government and some of the states in determining the gravity of various criminal offenses and the frustration to national or state law enforcement policy which could result from a prohibition of a second trial by the other sovereign. It concluded that a subsequent prosecution by the state did not violate the U. S. Constitution, nor could the Court find a violation of the N. J. Constitutional provision for the same reasons.

Cooper would appear to be conclusive on the issue before this Court since a "dual sovereignty" rationale cer-

tainly would apply to a federal interest in the stream of interstate commerce and a separate and distinct state interest in punishing law-breakers within its borders.

But defendants mount several attacks on *Cooper*.

First, defendants seem to imply that the New Jersey Supreme Court would not have decided *Cooper* the way it did had it done some additional research, and they urge this (5) Court to correct this oversight and reject the "dual sovereignty" theory since it has been "eroded". To sustain this contention, defendants cite several United States Supreme Court cases in which what they conveniently call the "dual sovereignty" theory was "rejected". *Rea* v. *U. S.*, 350 U. S. 214 (1956); *Elkins* v. *U. S.*, 364 U. S. 206 (1960) and *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U. S. 52 (1964). But these decisions represent only the application of the doctrine as it applies to the kind of evidence used in consecutive state-federal or federal-state prosecutions, not, as defendants would have it used here, to prevent a subsequent prosecution altogether.

Defendants next claim that, even if *Cooper* was correctly decided, it is distinguishable in that the federal statute there was designed to protect a matter of special federal concern, that is, the security of the national banking system and makes no reference to state law, while the state statute was designed to protect a distinctly different state concern, that is, protection of its citizens from dangerous weapons. However, the federal statute under which defendants were indicted here also protects a distinctly federal interest, that is, freeing interstate commerce from devices used to violate a law, the fact that

the law violated was a state law is of secondary importance, whereas the state law protects (6) citizens from the corruption of their government through bribery of public servants.

Nor does the fact that the *Cooper* court was concerned with an application for post-conviction relief make its decision any less binding on this Court since it cannot be presumed, despite defendants' suggestions, that the New Jersey Supreme Court would have applied two different standards on such an important constitutional issue in the absence of some clear indication to the contrary.

Having demonstrated why the dual sovereignty doctrine should no longer be adhered to; defendants go on to suggest that there is ample precedent for a state court's rejection of the United States Supreme Court decisions before they are expressly overruled by the highest court of the land. To soothe any apprehension this Court might have in taking so bold a step, defendants cite several state court decisions which had anticipated later Supreme Court rulings, and specifically, an opinion by an Ohio trial court in *State* v. *Fletcher,* 15 M. 211, 240 N.E. 2d 905 (1958), which found deouble jeopardy in a situation similar to the case at bar. Defendants fail to note, however, as the court in *Cooper, supra,* 338, that:

> "* * * As stated in *Bartkus, supra,* of the twenty-eight states which have considered the validity of successive state and federal (7) prosecutions as against a challenge of violation of either a state constitutional double-jeopardy provision or a common-law evidentiary rule of *autrefois acquit* and

autrefois convict, twenty-seven have refused to rule that the second prosecution was or would be barred." Citations.

Suffice it to say that even if this Court agreed with defendants' argument for the rejection of the "dual sovereignty" theory, it would hardly be propitious to fly in the face of a recent decision squarely on point by the highest court of this state on such dubious precedent.

Putting aside all considerations of double jeopardy, defendant Leuty next contends that the state prosecution here is barred by collateral estoppel, a somewhat nebulous offshoot of *res judicata* used in many criminal cases as a supplement to double jeopardy.

Even assuming, however, that the two prosecutions here present sufficient identity of issues and that no additional evidence could be pressed at the subsequent state prosecution, application of the doctrine of collateral estoppel still requires, as Leuty concedes, at least an identity of interests, if not a strict identity of parties. And if this Court accepts the "dual sovereignty" theory, as it is compelled to do by *Cooper, supra,* it (8) becomes immediately apparent that not only are the parties different, but the interests of each are not identical, the state's interest, therefore not being fully protected in the prior federal prosecution, thus precluding the operation of the collateral estoppel rationale.

State v. *Cormier,* 46 N. J. 494, 505 (1966), on which Leuty relies, cites strict identity of parties as a prerequisite to the operation of the doctrine, and indeed that case involved two successive prosecutions by the same sove-

reign, the state. Nor do the other cases which Leuty cites, all civil, support an extension of the doctrine to the situation *sub judice,* where two different sovereigns seek to vindicate separate policies underlying their separate penal laws. Rather, the Court looks to the more direct authority of *Ferina* v. *U. S.,* 340 F. 2d 837 (8th Cir. 1965). There, the Court expressly declined to use either double jeopardy, or *res judicata* to bar a federal prosecution for obstructing justice following a state acquittal for a felonious assault, even though both charges arose out of the same activity, since the offenses had been committed against two different sovereigns.

In conclusion, this Court is convinced that the result of the granting of defendants' motion at this time would be a blow to *stare decisis* and the entire state-federal dichotomous system of criminal justice which this (9) Court has neither the authority nor the inclination to strike.

The Court, finding no merit in any of defendants' arguments, hereby denies all motions to quash the indictments.

Counsel will submit an appropriate order.

Notice of Motion on Behalf of Defendant Robert E Jacks to Vacate and Dismiss Indictments

(Filed—July 15, 1969.)

NEW JERSEY SUPERIOR COURT
MIDDLESEX COUNTY—LAW DIVISION
(CRIMINAL)

Indictment No. 69-187
Jan. 1969 Stated Session
September Term 1968

THE STATE OF NEW JERSEY

vs.

WALTER ZIRPOLO, ROBERT E. JACKS, COLONIAL PIPELINE COMPANY, KARL T. FELDMAN, BEN D. LEUTY, ROWLAND TOMPKINS. CORPORATION, BECHTEL CORPORATION; GATES CONSTRUCTION CORPORATION, GATES EQUIPMENT CORPORATION,

Defendants.

Indictment No. 69-188
Jan. 1969 Stated Session
September Term 1968

THE STATE OF NEW JERSEY

vs.

WALTER ZIRPOLO, ROBERT E. JACKS,

Defendants.

Notice of Motion on Behalf of Defendant Robert E. Jacks to Vacate and Dismiss Indictments

Indictment No. 69-190

Jan. 1969 Stated Session

September Term 1968

THE STATE OF NEW JERSEY

vs.

ROBERT E. JACKS,

Defendant.

To: HONORABLE EDWARD J. DOLAN
Prosecutor of Middlesex County
Court House
New Brunswick, New Jersey

SIR:

TAKE NOTICE that the undersigned, Toolan, Romond & Burgess, attorneys for the defendant Robert E. Jacks, will move before the New Jersey Superior Court, Middlesex County, Law Division, Court House, New Brunswick, New Jersey, on August 1, 1969, at 9:30 o'clock in the forenoon or as soon thereafter as counsel may be heard, for an order vacating and dismissing the above captioned indictments against the defendant Robert E. Jacks on the ground of double jeopardy because the said Robert E. Jacks has been indicted, tried and convicted in the United States District Court for the District of New Jersey for an offense arising out of the identical state of facts which

Notice of Motion on Behalf of Defendant Robert E. Jacks to Vacate and Dismiss Indictments

the State will attempt to prove against him to support the above captioned indictments, and for the further reason that to subject the defendant Robert E. Jacks to now stand trial on the above captioned indictments would be a violation of his constitutional rights (Article V of the Constitution of the United States) not to be twice tried for the same offense.

On this motion, defendant Jacks will rely upon the annexed affidavit and a brief in support of this motion to be hereafter submitted.

TOOLAN, ROMOND & BURGESS
Attorneys for Defendant Robert E. Jacks
By: /s/ JOHN E. TOOLAN
A Member of the Firm

Dated: July 15, 1969.

Affidavit of John E. Toolan in Support of Motion

STATE OF NEW JERSEY, }
COUNTY OF MIDDLESEX, } SS.:

JOHN E. TOOLAN, being duly sworn, says:

1. I am a member of the firm of Tolan, Romond & Burgess, with offices at 214 Smith Street, Perth Amboy, New Jersey, and the person in active charge of the above-entitled cases insofar as they relate to the defendant Robert E. Jacks.

2. The defendant Robert E. Jacks, at the times referred to in the above-captioned indictments, was a Committeeman representing the Third Ward of the Township of Woodbridge.

3. On or about February 23, 1967, the Grand Jury in and for the United States District Court for the district of New Jersey returned an indictment consisting of nine counts (Cr. No. 75-67) against the defendant Robert E. Jacks and Walter Zirpolo, Colonial Pipeline Company, Karl T. Feldman, Glenn H. Giles, Ben D. Leuty, Rowland Tompkins Corporation, Bechtel Corporation, Gates Construction Corporation, and Gates Equipment Corporation.

4. Briefly summarized, the respective counts in said federal indictment charge:

A. First Count: That the defendants, Walter Zirpolo, Robert E. Jacks, Colonial Pipeline Company, Glenn H. Giles, Karl T. Feldman, Ben D. Leuty and Rowland Tompkins Corporation conspired with two unindicted defendants, to wit, Howard Tompkins and Ralph A. Bankes, to commit certain offenses against the United States in violation of Section 1952, Title 18, U. S. Code, by travelling and causing others to travel in interstate commerce

with the intent to promote and facilitate an unlawful activity, to wit, the obtaining of a building permit by bribery from the Township of Woodbridge in violation of N.J.S. 2A:93-6.

More specifically, said indictment charged that said Robert E. Jacks solicited from the defendant Colonial Pipeline Company, through its employee Fred Stewart, a campaign contribution in the amount of $50,000 in return for aiding the said Pipeline Company, after the November 5th elections 1963, in securing a building permit from the Township of Woodbridge aforesaid.

Said indictment set forth 19 alleged overt acts, among which were the following:

(a) That on or about November 7, 1963, there was paid to the said defendant Robert E. Jacks the sum of $20,000.

(b) That on or about February 6, 1964, the said Robert E. Jacks received a further sum of $15,000.

(c) That on or about November 27, 1964, the said Robert E. Jacks received a further sum of $15,000.

Said indictment further alleged that each of said payments were made by one or more or all of the indicted and unindicted defendants.

B. Second Count: This substantive count alleges that the defendant Robert E. Jacks and defendants Walter Zirpolo, Colonial Pipeline Company, Karl T. Feldman, Glenn H. Giles, Ben D. Leuty and Rowland Tompkins Corporation on or about November 7, 1963, caused a representative of the Rowland Tompkins Corporation to travel in interstate commerce between Briarcliff Manor, New York, and Woodbridge, New Jersey, with intent to facili-

tate and promote an unlawful activity in the State of New Jersey, to wit, bribery, in violation of N.J.S. 2A:93-6, and deliver the sum of $20,000 to the defendant Robert E. Jacks in the Township of Woodbridge, Middlesex County, New Jersey.

C. Third Count: This substantive count alleges that the defendant Robert E. Jacks and defendant Walter Zirpolo, Colonial Pipeline Company, Karl T. Feldman, Glenn H. Giles, Ben D. Leuty and Rowland Tompkins Corporation on or about December 13, 1963, caused a representative of the Rowland Tompkins Corporation to travel in interstate commerce between Hawthorne, New York, and Woodbridge, New Jersey, with intent to facilitate and promote an unlawful activity in the State of New Jersey, to wit, bribery, in violation of N.J.S. 2A:93-6, for the purposes of attempting to deliver the sum of $15,000 to the defendant Robert E. Jacks, in the Township of Woodbridge, Middlesex County, New Jersey.

D. Fourth Count: This substantive count alleges that the defendant Robert E. Jacks and defendants Walter Zirpolo, Colonial Pipeline Company, Karl T. Feldman, Glenn H. Giles, Ben D. Leuty and Rowland Tompkins Corporation on or about February 6, 1964, caused a representative of the Rowland Tompkins Corporation to travel in interstate commerce between Hawthorne, New York, and Woodbridge, New Jersey, with intent to facilitate and promote an unlawful activity in the State of New Jersey, to wit, bribery, in violation of N.J.S. 2A:93-6, and delivered the sum of $15,000 to the defendant Robert E. Jacks in the Township of Woodbridge, Middlesex County, New Jersey.

E. Fifth Count: This substantive count alleges that the defendant Robert E. Jacks and defendants Walter

Zirpolo, Colonial Pipeline Company, Karl T. Feldman, Glenn H. Giles, Ben D. Leuty and Rowland Tompkins Corporation on or about November 27, 1964, caused a representative of the Rowland Tompkins Corporations to travel in interstate commerce between Briarcliff Manor, New York, and Edison, New Jersey, with intent to facilitate and promote an unlawful activity in the State of New Jersey, to wit, bribery, in violation of N.J.S. 2A: 93-6, and delivered the sum of $15,000 to the defendant Robert E. Jacks in Edison, Middlesex County, New Jersey.

F. Sixth Count: That the defendants, Walter Zirpolo, Robert E. Jacks, Colonial Pipeline Company, Glenn H. Giles, Karl T. Feldman, Ben D. Leuty, Bechtel Corporation, Gates Construction Corporation and Gates Equipment Corporation conspired with four unindicted defendants, to wit, Harry F. Waste, Robert L. Bowman, William L. J. Fallow and Robert S. Gates, to commit certain offenses against the United States in violation of Section 1952, Title 18, U. S. Code, by travelling and causing others to travel in interstate commerce with the intent to promote and facilitate an unlawful activity, to wit, obtaining an easement by bribery from the Township of Woodbridge in violation of N.J.S. 2A:93-6.

More specifically, said indictment charged that said Robert E. Jacks solicited from the defendant Colonial Pipeline Company, through its employee Fred Stewart, a contribution in the amount of $100,000 (of which $60,000 was paid by one or more of the defendants to the defendant Robert E. Jacks in three installments of $20,000 each).

G. Seventh Count: This subtantive count alleges that the defendant Robert E. Jacks and defendants Walter Zirpolo, Colonial Pipeline Company, Karl T. Feldman,

Glenn H. Giles, Ben D. Leuty and Bechtel Corporation, on or about October 11, 1964, caused William L. J. Fallow to travel in interstate commerce between San Francisco, California and Edison, New Jersey, with intent to facilitate and promote an unlawful activity in the State of New Jersey, to wit, bribery, in violation of N.J.S. 2A:93-6, and delivered the sum of $20,000 to the defendant Robert E. Jacks in Edison, New Jersey.

H. Eighth Count: This substantive count alleges that the defendant Robert E. Jacks and defendants Walter Zirpolo, Colonial Pipeline Company, Karl T. Feldman, Glenn H. Giles, Ben D. Leuty, Gates Construction Corporation and Gates Equipment Corporation, on or about November 17, 1964, caused Robert L. Bowman to travel in interstate commerce between San Francisco, California, and Edison, New Jersey, with intent to facilitate and promote an unlawful activity in the State of New Jersey, to wit, bribery, in violation of N.J.S. 2A:93-6, and delivered the sum of $20,000 to the defendant Robert E. Jacks in Edison, New Jersey.

I. Ninth Count: This substantive count alleges that the defendant Robert E. Jacks and defendants Walter Zirpolo, Colonial Pipeline Company, Karl T. Feldman, Glenn H. Giles, Ben D. Leuty, Gates Construction Corporation and Gates Equipment Corporation, on or about December 13, 1964, caused Robert L. Bowman to travel in interstate commerce between San Francisco, California, and Edison, New Jersey, with intent to facilitate and promote an unlawful activity in the State of New Jersey, to wit, bribery, in violation of N.J.S. 2A:93-6, and delivered the sum of $20,000 to the defendant Robert E. Jacks in Edison, New Jersey.

Affidavit of John E. Toolan in Support of Motion

5. The defendant, Robert E. Jacks, together with the defendants, Colonial Pipeline Company, Karl T. Feldman, Glenn H. Giles, Ben D. Leuty, Rowland Tompkins Corporation, Bechtel Corporation, Gates Construction Corporation and Gates Equipment Corporation were tried in the United States District Court for the District of New Jersey, on or about November 13, 1968. On January 23, 1969, the jury found the defendant Robert E. Jacks guilty on Counts 1, 6 and 7 and not guilty on the other six counts.

6. The above captioned indictments against the defendant Robert E. Jacks and others were returned by the Middlesex County Grand Jury on or about February 21, 1969. Indictment No. 69-187 charges the defendant Robert E. Jacks and others with conspiracy to commit bribery in violation of N.J.S. 2A:98-1 (conspiracy statute) and 2A:93-6 (giving or accepting bribe in connection with government work). Indictment No. 69-188 charges the defendant Robert E. Jacks and others with conspiracy to commit the crime of extortion in violation of N.J.S. 2A:98-1 (conspiracy statute) and 2A:105-1 (unlawful taking). Indictment No. 96-190 charges the defendant Robert E. Jacks with misconduct in public office in violation of N.J.S. 2A:85-1 (offenses indictable at common law not otherwise covered).

7. A reading of the aforesaid three indictments returned by the Middlesex County Grand Jury demonstrates beyond dispute or argument that said three indictments are based upon the identical state of facts that gave rise to the indictment of the defendant Robert E. Jacks in the United States District Court for the District of New Jersey and heretofore particularly referred to.

Affidavit of John E. Toolan in Support of Motion

8. The indictment in the United States District Court and the three indictments returned by the Middlesex County Grand Jury are based upon an alleged request made by the defendant Jacks to a representative of the defendant Colonial Pipeline Company for a political contribution in the amount of $50,000 to induce the said Jacks to aid and assist the Colonial Pipeline Company in obtaining certain building permits in the Township of Woodbridge and an alleged request by the said defendant Jacks of the same representative, to wit, Fred Stewart of Colonial Pipeline Company, for the sum of $100,000 (of which $60,000 was eventually paid) to assist and aid said Colonial Pipeline in obtaining certain easements and rights of way in the Township of Woodbridge.

9. The respective conspiracy indictments returned by the Middlesex County Grand Jury are each in 7 counts rather than the 9 counts set forth in the indictment returned in the United States District Court. The first and second substantive counts set forth in the federal indictment are not set forth in the State indictment because the alleged payments of $20,000 on November 7, 1963, and $15,000 on February 6, 1964, were outlawed by the five-year statute of limitations at the time the indictments were returned by the Middlesex County Grand Jury.

10. A substantial portion of the language in the respective conspiracy indictments returned by the Middlesex County Grand Jury is a verbatim copy of the conspiracy indictments returned by the Federal Grand Jury. The dates of the alleged respective payments to the defendant Jacks are identical in the state and federal indictments.

11. In the event of a trial of these defendants in the County of Middlesex, the State will call—will be com-

pelled to call—the identical witnesses that were called in the trial of the indictment in the federal court.

12. The indictment returned by the Federal Grand Jury was founded upon the violation of a New Jersey statute, to wit, N.J.S. 2A:93-6. The New Jersey indictments charge conspiracy and the violation of 2A:96-3, 2A:105-1, and 2A:85-1. The only evidence in the possession of the State from which it can hope to establish a violation of any of the above identified statutes will come from the identical witnesses that were called by the government in the trial in the federal court.

13. Article V of the United States Constitution reads, in part, as follows: "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb." The defendant Robert E. Jacks is a citizen of the United States. He has been indicted by the federal grand jury, tried and convicted on three counts of an offense arising out of the alleged request for money from the Colonial Pipeline Company to aid that Company in obtaining a building permit and certain easements in the Township of Woodbridge. The indictments now before this Court are based upon that identical transaction. Any alleged assertion of dual sovereignty as a justification for the indictments by the Middlesex County Grand Jury deprives the defendant Robert E. Jacks of his constitutional right not to be tried twice for the same offense.

/s/ JOHN E. TOOLAN

(Sworn to July 15, 1969.)

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AUG 17 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

~~Nos. 1832, 1852, 1853, 1854, 1862~~

70-287, 70-307, 70-308, 70-317

ROBERT E. JACKS,
Petitioner in No. 1832,

BECHTEL CORPORATION,
Petitioner in No. 1852,

KARL T. FELDMAN,
Petitioner in No. 1853,

COLONIAL PIPELINE COMPANY,
Petitioner in No. 1854,

BEN D. LEUTY,
Petitioner in No. 1862,

vs.

STATE OF NEW JERSEY,
Respondent.

On Petitions for Certiorari to the Superior Court of New Jersey, Middlesex County

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

GEORGE F. KUGLER, JR.,
Attorney General of New Jersey,
Attorney for Respondent,
State House Annex,
Trenton, New Jersey, 08625.

MICHAEL R. PERLE,
Deputy Attorney General,
Division of Criminal Justice,
Of Counsel and on the Brief.

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IN THE

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OCTOBER TERM, 1970

Nos. 1832, 1852, 1853, 1854, 1862

ROBERT E. JACKS,
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Petitioner in No. 1854,

BEN D. LEUTY,
Petitioner in No. 1862,

vs.

STATE OF NEW JERSEY,
Respondent.

On Petitions for Certiorari to the Superior Court of New Jersey, Middlesex County

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

Respondent, State of New Jersey, respectfully prays that writs of certiorari sought in the above-captioned pe-

titions to review the interlocutory order of the Superior Court of New Jersey, Law Division, Middlesex County, entered December 8, 1969 denying motions of all petitioners to dismiss pending indictments, be denied. Inasmuch as these cases arise out of a single series of transactions and largely involve identical issues of law, this brief is offered as a consolidated response to all pending petitions.

Counter-Statement of Jurisdiction

Respondent denies that this Court possesses jurisdiction under 28 U.S.C. §1257 (3) to consider the above-named matter on petition for certiorari.

The theory upon which all petitioners assert the jurisdiction of this Court, when applied to the facts of the instant cases, does not project the requisite "final order or decree" upon which such jurisdiction must be founded. In essence, petitioners say that if this Court ultimately finds that *Bartkus* v. *Illinois,* 359 U. S. 121 (1959), should be overruled, leaving aside the facts of these cases, jurisdiction is properly asserted, and a substantial federal question is thereby presented. But they do not cite a another instance where this Court has considered an interlocutory order of a state court as final for purposes of jurisdiction through a similar exercise in prospective overruling. *Cf. Carroll* v. *United States,* 354 U. S. 394, 403-405 (1957).

The more fundamental infirmity of the instant petitions is their common assumption that respondent's ability to try them on the pending state indictments is pivoted exclusively on the vitality of the *Bartkus* doctrine. It is demonstrated below that this notion must fall of its own weight, and with it any basis for present jurisdiction.

Moreover, before the dual sovereignty question can even be brought into focus, the trial court must have an adequate opportunity to develop the factual issues in these cases in light of the collateral estoppel principles articulated in *Ashe* v. *Swenson,* 397 U. S. 436 (1970). An application of those principles and stipulations of facts by the parties may make it evident that in trying petitioner, *Bartkus* need not be invoked at all to avoid collision with the general principles of double jeopardy, even upon counts which appear to parallel those upon which petitioners were acquitted in the federal courts.

In trying petitioners Jacks, Leuty and Feldman the trial court must focus upon the same facts embraced in the two all-encompassing conspiracy counts upon which they were initially convicted, but have hitherto escaped punishment.

Thus, even assuming *Bartkus* were no longer the law at this moment, and trial on the similar counts would be technically improper under the principles of collateral estoppel, trying petitioners upon such additional counts would itself involve no greater burden, anxiety or expense than trial limited to the all-embracing conspiracy charges; nor could it by itself constitute irreparable jury. *Younger* v. *Harris,* —— U. S. ——, 91 S. Ct. 746, 751 (1971). Even accepting petitioners' premise that *Bartkus* has been emasculated, trial on the added counts would amount to harmless error.

Likewise, given the present posture of these cases and the facts that *Bartkus* is the law at this moment, the dual sovereignty question will only become substantial and ripe for the Court's decision when it is presented in terms of respondent's ability to impose a punishment after the courts of New Jersey have passed upon it on

a full record. In every case which has served as a vehicle for re-examination of the double jeopardy clause in a state or inter-jurisdictional context, this Court has only considered such questions in terms of the possibility of punishment; e.g., *Bartkus* v. *Illinois, supra; Abbate* v. *United States,* 359 U. S. 187 (1959); *Benton* v. *Maryland,* 395 U. S. 784 (1969); *Ashe* v. *Swenson, supra.* On the other hand a procedure which allowed interlocutory assaults on governing precedents would be antiethical to any notion of comity and a grave hindrance to the administration of justice.

Hence, review at this juncture would be premature since the *Bartkus* question, which has real significance only in terms of punishment on the substantive counts must remain hypothetical until the possibility of such punishment becomes imminent.

Counter-Statement of Questions Presented

1. Are corporations within the protection of the Fifth Amendment guarantee that: "no person . . . shall be subject, for the same offense, to be twice put in jeopardy of life and limb . . ."?

2. May a state try a defendant under a valid state indictment after defendant's convictions on similar federal charges has been set aside at the instance of defendant without a showing of prejudice to defendant, upon a finding that the grand jury which returned the federal indictments was improperly selected?

3. Is a prosecution under N.J.S.A. 2A:93-6 (following an acquittal upon federal charges alleging violation of 18 U.S.C. §1952 based on an "intent" to facilitate or promote the violation of N.J.S.A. 2A:93-6 through interstate

means) barred under the principles of collateral estoppel lately set down in *Ashe* v. *Swenson, supra?*

4. Assuming the right of a state to try a defendant on several counts of an indictment including the all-embracing conspiracy counts is not dependent on the doctrine of dual sovereignty, should this Court before trial grant review to determine whether *Bartkus* v. *Illinois,* should be overruled in order to avoid the possibility that ultimately the right of the state to punish defendant upon a conviction on other counts might depend on the fact of the state's separate sovereignty?

Counter-Statement of the Case

From early in 1963 and through the end of 1964, petitioner, Colonial Pipeline Co. ("Colonial") a corporation of which petitioner Leuty was president, and petitioner Feldman was vice president, engaged in the construction of an interstate pipeline system terminating in New Jersey. Petitioner Bechtel Corporation ("Bechtel") was under contract with Colonial to perform some of the engineering and construction work on the project. Colonial's wished to establish a terminal facility for the system in Woodbridge, New Jersey, within the Port Reading section of the third ward in that township. During 1963, the third ward was represented on the Woodbridge township committee by petitioner Robert E. Jacks. On January 1, 1964, Jacks assumed the position of president and voting member of the Municipal Council of Woodbridge. Walter Zirpolo, at all times relevant to these cases served as mayor of Woodbridge and as a voting member of its planning board.

The terminal facility envisioned by Colonial involved the construction of 22 petroleum storage tanks for which

a building permit was required. Apparently, Colonial was aware of stiff opposition among the residents of the third ward to the project. Realizing that legitimate channels might be unavailing, Colonial solicited the assistance of Mayor Zirpolo in securing the permit. In order to complete the system, Colonial also was required to obtain easements from the City of Woodbridge to permit it to run the pipeline through township property to the projected terminal point. Colonial also sought Zirpolo's assistance in promoting the sale of the easements from the township to Colonial.

However, Zirpolo was not able to offer immediate assistance. An election was imminent (on November 3, 1963) and Zirpolo was a candidate for re-election. His associate Jacks was running for the council post. They both had promised their constituents that no new tanks would be built in the Port Reading area. Consequently Zirpolo informed Colonial that it would be more feasible politically to defer formal action on the permit and easements until after the election. In the interim the details of the plan were worked out between a representative of Colonial and Jacks acting on behalf of himself and Zirpolo.

Eventually the officers of Colonial including Leuty and Feldman accepted the plan as proposed by Zirpolo and Jacks. Two separate conspiracies were developed. The conspiracy to obtain the building permit assumed the following configuration: Colonial's officers agreed to a bribe of $50,000.00 to Zirpolo and Jacks in the guise of a campaign contribution to assure their assistance in the matter. The money was to come from Colonial's Atlanta office and be delivered in separate installments of $20,000.00, $15,000.00 and $15,000.00. Colonial officers, most

prominently Leuty and Feldman, enlisted the aid of one of their sub-contractors to transmit the payments to Zirpolo and Jacks in New Jersey. The first payment was to be made on the day following the election; the second payment was to be due at the time of the issuance of the building permit and the final payment was to be made after the certificate of occupancy had been issued to Colonial by the township. Respondent will seek to prove on trial that all of this came to pass.

Beginning in January of 1964, a second conspiracy was developed among Colonial's officers and Zirpolo and Jacks to obtain the desired easement. For their assistance in this matter, Zirpolo and Jacks were to receive the amount of $10,000.00 from Colonial. Leuty and Feldman and other Colonial officers in working out the details of this scheme and its eventual execution. This plan also came to fruition as will be proven at trial.

In February 1967, all of the petitioners, as well as several others, were indicted by a federal grand jury for various substantive violations of 18 U.S.C. §1952 and conspiracy to violate that act based on the foregoing transactions. The federal indictment charged all of the petitioners with the exception of Bechtel in seven substantive counts, alleging separate acts of unlawfully employing the facilities of interstate commerce to ". . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of . . . [and] unlawful activity . . . [i.e.] extortion, . . . [or] bribery in violation of the laws of the state in which committed or of the United States . . ." It is recited therein that the alleged wrongful use of interstate means was intended to facilitate the violation of N.J.S.A. 2A:93-6, a bribery statute, and other bribery laws, although the federal indictments do not charge that such New Jersey laws were thereby violated.

Also included in the federal indictments were two conspiracy counts relating first to the scheme developed to obtain the building permit and second, to the plan to procure the sale of the easements. Bechtel, unlike the other petitioners, was only charged with participating in the second conspiracy and in conduct designed to affect a payment to Jacks and Zirpolo in New Jersey, pursuant to that scheme.

On January 3, 1969, verdicts were returned on the federal indictments against all petitioners. Petitioner Colonial was found guilty on all counts and fined a total of $90,000.00; petitioners Leuty and Feldman were found guilty only on the two conspiracy counts; petitioner Bechtel was found guilty on both of the counts on which it had been indicted; petitioner Jacks was found guilty on both conspiracy counts and one substantive count.

The United States Court of Appeals for the Third Circuit set aside petitioners federal convictions on the ground that the method used in the district of New Jersey to impanel the grand jury which returned the federal indictments departed from the pertinent statutory standard and resulted in a systematic under-representation of women. However, in setting aside the convictions the court noted that there was no proof of prejudice to petitioners resulting from this improper practice. *United States* v. *Zirpolo, et al.*, —— F. 2d ——, Crim. Nos. 18,-137-18,142, 3 Cir., Feb. 18, 1971 (Slip opinion, at 7-8). The Third Circuit on July 1, 1971, denied the petition of the United States for re-hearing *en banc* in these cases and the government has been required to reindict petitioners.

After the return of the federal indictments, the Middlesex County grand jury returned a series of indictments against petitioners relating to state violations arising out

of the same transactions which formed the basis of the federal indictments. Most of these charges allege violations of N.J.S.A. 2A:93-6, the bribery statute, whose violation was recited to be the intended object of the proscribed activity forming the basis of the federal indictments. Petitioners were also charged in various counts with aiding and abetting violations of N.J.S.A. 2A:93-6, as well as with two separate counts of conspiracy to violate this provision. Separate indictments were also returned against Jacks and Zirpolo, charging them with two conspiratorial and five substantive violations of N.J.S.A. 2A:105-1 which prohibits unlawful takings by public officers under color of office. A third state indictment was returned charging Jacks alone with five counts of common law misconduct in office in violation of N.J.S.A. 2A:85-1.

Petitioners applied before Mr. Justice Brennan for stay of the state proceedings pending the filing of petition for certiorari in this Court. After full review of petitioners' applications supported by briefs, which set forth the same arguments made in the pending petitions, as well as respondent's memorandum in opposition to the application, Mr. Justice Brennan denied such applications on April 23, 1971.

Reasons for Denying the Writ

Petitioners have portrayed all the pending cases as frontal assaults on the doctrine of *Bartkus* v. *Illinois,* 358 U. S. 121 (1959). Respondent will demonstrate that at best the *Bartkus* question is tangential in every one of these cases in their present postures and clearly insubstantial. In every case the threshhold question is respondent's ability to *try* the particular petitioner involved on

some basis and such ability does not rest on *Bartkus*. Respondent contends that at this juncture the Court is without jurisdiction in the pending cases, irrespective of whether at some later time respondent's ability to punish petitioners for some of the offenses alleged may depend upon the survival of the dual sovereignty concept. It at a later point in the proceedings, this question rises above a hypothetical concern and is decided adversely to petitioners by the courts of New Jersey, it might then and only then become ripe for review by this Court.

In support of respondent's contention that its present right to *try* petitioners is beyond challenge, it will demonstrate that: (a) the double jeopardy clause of the Fifth Amendment protects only natural persons and may not be availed of by the corporate petitioners, Bechtel and Colonial; (b) the statutes under which respondent seeks to try petitioners are conceptually distinct from 18 U.S.C. §1952 and require the proof of wholly different acts in order to establish the violations in question; (c) trial of petitioners upon separate state indictments, following the setting aside upon motions of petitioners of their convictions on similar federal charges on the ground that the underlying federal indictments were technically defective is entirely consistent with the federal standards set forth in *Ewell* v. *U. S.*, 383 U. S. 116, (1966) and applied to the states under *Benton* v. *Maryland, supra,* and any erosion of the dual sovereignty concept must serve to reinforce this conclusion; (d) trial of all petitioners, particularly petitioner Jacks, who acknowledges that the federal substantive charges against him failed only because there was no proof of interstate activity on his part, is fully consistent with the collateral estoppel doctrine of *Ashe* v. *Swenson, supra,* even under the principles urged on this Court by Justice Brennan, *Id.*, 397 U. S., at 53, n.7.

POINT I

Respondent seeks to prosecute petitioners for violations of statutes that are conceptually distinct, and require different proofs from the violations under 18 U.S.C. §1952 for which they were tried.

Petitioners state that respondent is seeking to prosecute them a second time for violations of the same statute for which they have already been tried in the federal courts. Such representations are plainly inaccurate as a glance at the federal indictments reveals. (See Petitioner Leuty's Appendix "D").

The federal government attempted to prosecute petitioners for violating U.S.C. §1952. Like penal provisions generally, a violation of this statute is founded upon the merger of certain conduct with a certain intent. The conduct in question is described as ". . . [travelling] in interstate or foreign commerce or . . . [use of] any facility in interstate or foreign commerce. . . ." 18 U.S.C. §1952.

However, such acts are only punishable under 18 U.S.C. §1952 if they are undertaken with the "intent" to (inter alia):

> ". . . (3) . . . promote, manage, establish, carry on, or facilitate the promotion, management, or carrying on of any unlawful activity."

The "unlawful" "activity" that is the object of the accompanying intent may take one of several forms, to wit:

> (1) ". . . [a] business enterprise involving gambling, liquor on which the federal exise tax has

> not been paid, narcotics, or prostitution offenses in violation of the laws of the state in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which they are committed . . . or [extortion, bribery, or arson in violation of the laws] of the United States." 18 U.S.C. §1952(b)

The configuration of this statute is reminiscent of the common law crime of burglary which is also a product of the merger of a species of often-innocuous conduct with an intent to commit certain types of illegal acts. (i.e., felonies). The crime of burglary is, of course, conceptually distinct from whatever felony might ensue. The burglary and the felony remain separately punishable though they share and require proof of but a single intent.

To similar effect, it is obvious that Congress in passing 18 U.S.C. §1952 did not thereby intend to have that statute supplant every existing federal gambling, liquor, narcotics, prostitution, extortion, bribery, or arson statute then in force. But in the final analysis the petitioners' contentions reduce to an assertion that in enacting the Travel Act, 18 U.S.C. §1952, Congress vested the federal courts with pre-emptive jurisdiction in any case where the alleged violation of a state statute of the classes enumerated in 18 U.S.C. §1952 is touched by interstate activity. It should be self-evident that Congress did not intend this result, particularly where violation of a state rather than a federal law is concerned. To suppose otherwise would be at odds with the whole philosophy of federalism that undergirds our system of government.

Moreover, petitioners' notion is strongly belied by observations of this Court in *United States* v. *Nardello,* 393 U. S. 286 (1969). In *Nardello,* this Court found the purpose of the Travel Act was to supplement, not supplant the machinery available to local officials in combating crime. *Id.* 393 U. S. at 290. The Act was designed only as a means of reaching into those areas of wrongful conduct which could not be dealt with under state law. Its purpose, as illuminated in *Nardello,* was to close gaps that existed in both federal and State law enforcement schemes rather than as petitioners contend, to "backstop" or, more accurately, pre-empt local law enforcement. Petitioners do not point to a single case where prosecution under 18 U.S.C. §1952 has been held to bar simultaneous prosecution and conviction under the same federal indictment for commission of the substantive federal crime that the proscribed interstate activity was intended to promote or facilitate. *Cf. Gore* v. *United States,* 357 U. S. 386 (1958), *reh. den.* 358 U. S. 858. To suppose otherwise would do obvious violence to the clear intent of Congress.

While the violations charged in the various state indictments in the instant cases by-and-large charge the same intent (*mens re*) as the violations charged in the federal indictments, the acts proscribed thereunder are wholly distinct and separate from the acts which form the basis for the violations of 18 U.S.C. §1952 charged under the federal indictments. Just as in a prosecution for common law burglary, it is possible for one to commit burglary with the requisite felonious intent without being chargeable for the intended felony or, on the other hand, to be chargeable with the intended felony in a situation where the elements of common law burglary are not present (e.g., where the entry takes place in the day-

time), the federal law may be violated without the occurrence of a state violation, or vice versa. Of course, with regard to the violations of N.J.S.A. 2A:85-1 and N.J.S.A. 2A:105-1 for which the defendant Jacks was separately indicted, the requisite intent is not shared by the state violations charged and the federal violations for which Jacks was prosecuted.

In any event it is plain that the federal prosecution of these petitioners could implicate no more than the intent element of the violations of N.J.S.A. 2A:93-6 charged under the state indictments. Thus, as petitioner Leuty acknowledged in the lower court, even if the double jeopardy guarantee is to be applied in these cases, it must be applied in the form of collateral estoppel, not actual *res judicata.*

Ashe v. *Swenson, supra,* is a controlling authority in this area. The Court in *Ashe* stated the principles of collateral estoppel to be: ". . . simply that when an issue of ultimate facts has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any further law suit." *Id.* 397 U. S., at 443. Assuming, for argument's sake, that separate sovereignty is to have no force and federal and state governments must therefore be treated as the same party for purposes of collateral estoppel it still remains apparent in all these cases that: ". . . a rational jury [in the federal case] could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* 397 U. S., at 444 (footnote omitted). Indeed, petitioner Jacks candidly admits that he avoided conviction on several substantive charges only because of a lack of evidence concerning his involvement with interstate activities. The corporate petitioners, of course, were found guilty on all counts so that there

is no basis for contending that the State seeks reconsideration of any issue of ultimate fact with regard to either of them.

Petitioner Leuty however contends that although his acquittal on the substantive charges of the federal indictment was based upon a general verdict, the only factual question regarding his guilt in dispute there was that of *intent* to commit bribery. This contention is strongly belied by the federal jury's determination of guilt on the conspiracy counts which required the identical determination of intent. In any event, only the trial court would be in a position to make the pragmatic inquiry directed by *Ashe* as to the "sameness" of the evidence to be presented in the state prosecution.

It is interesting to note that even if this Court were to adopt the "same transaction test" urged by Mr. Justice Brennan in *Ashe* v. *Swenson, supra,* 397 U. S. at 448 *et seq.,* collateral estoppel would not bar the State prosecution. The federal courts have not tried these petitioners for violation of N.J.S.A. 2A:93-6. They lack jurisdiction to do so. Neither the federal court nor the state court has jurisdiction to try petitioners for all of the violations arising out of the transactions in question. As Mr. Justice Brennan noted, even the expansive view of the double jeopardy clause he would have adopted could not bar a second prosecution where no single court had jurisdiction of all the alleged crimes arising out of a single transaction. *Id.* 397 U. S., at 453, n. 7.

Thus, respondents submit that even if the dual sovereignty doctrine of *Bartkus* no longer held any force, prosecution of these defendants would be entirely compatable with the principles of double jeopardy relevant to these cases.

POINT II

Petitioners, Colonial and Bechtel are not protected by the Double Jeopardy Clause of the Fifth Amendment.

Two of the petitioners in these cases are multi-million dollar corporations. They have no standing to invoke the protection of the Double Jeopardy Clause of the Fifth Amendment which provides that:

> "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

Plainly, a corporation, which is without "life or limb" was not intended to be protected by this provision. Even Mr. Justice Black on behalf of the dissenters in *Bartkus, supra,* made clear throughout his opinion that his conception of the protection afforded by the guarantee extended only to natural persons. (E.g., "people", *id.* at 151; "a man", *id.* at 155; "people", *id.* at 156; "a man", *id.* at 160; "the poor and the weak in our society, individuals without friends in high places", and "a man", *id.* at 163). See also *Barton* v. *Maryland, supra.* (Opinion of Mr. Justice Marshall).

The notion that corporations have standing to invoke the double jeopardy clause appears to be unsupported by any authority other than some off-hand comments by a California district court. (*U. S.* v. *Arnco Steel Corp.,* 252 F. Supp. 364, 368 (D. C. Cal. 1966)). Subsequently however, this Court held in *Campbell Painting Corp.* v. *Reid,* 392 U. S. 286 (1968) that the Fifth Amendment privilege against self-incrimination applies only to natural individuals. *Id.* 392 U. S. at 288, 20 L. Ed. 2d at 1097. Unlike the self-incrimination clause nothing in the double

jeopardy clause has any pertinence to non-natural persons. Clearly its protection is not available to a corporation. For this reason in addition to others, respondent respectfully submits that the petitions of Colonial and Bechtel must be denied.

POINT III

Trial of petitioners on counts similar to counts upon which they were convicted under an invalid federal indictment later set aside is consistent with the applicable federal standard of double jeopardy.

It is well established in federal law that a defendant can claim no former jeopardy after a judgment for conviction upon an invalid indictment has been set aside as a result of defendant's challenge to the indictment. *Ewell* v. *United States, supra,* 383 U. S. at 124; *Ball* v. *United States,* 163 U. S. 662, 672, 16 S. Ct. 1192, 1195 (1896). The doctrine of "continuing jeopardy", (e.g. *Price* v. *Georgia,* 398 U. S. 322 (1970); *Green* v. *United States,* 355 U. S. 184, 189 (1957), is inapposite where defendant has procured a reversal of conviction on the basis of the invalidity of the indictment (e.g., *Ewell, supra, Ball, supra;*) rather than on the basis of trial errors (e.g., *Price, supra, Green, supra*).

The foregoing conclusion is inescapable, in view of the illumination of the conceptual basis of *Ewell* provided by recent circuit decisions. In *United States* v. *Beard,* 414 F. 2d 1014 (3d Cir. 1969) the court found that a count in an indictment which failed to allege unlawful or fraudulent intent was a nullity. Based upon this determination the court citing in support *Ball, supra,* and *Ewell,*

supra, stated that: "The United States will be free to reindict and retry these defendants according to law." *Id.* 414 F. 2d at 1017. *United States* v. *Franke,* 409 F. 2d 958 (7 Cir. 1969) is to similar effect.

If, for purposes of the constitutional guarantee, no former jeopardy attached from trial and conviction on various counts of the invalid federal indictments, now quashed, *a fortiori,* prosecution under these counts cannot bar prosecution by the State under an indictment which includes similar counts. The holding of *Benton* v. *Maryland,* 395 U. S. 784 (1969), that the state and federal standards of double jeopardy are the same dictates this conclusion. Moreover, the thrust of petitioner's assault upon the dual sovereignty doctrine is that the federal and state governments should be regarded as one for purposes of the second trial. A contention that the State, after a defendants conviction and subsequent reversal of conviction under circumstances not amounting to former federal jeopardy, is barred from trying the defendant is therefore incompatible with this notion since the former must rest of course on the maintenance of formal distinctions between the prosecutorial agencies.

For the foregoing reasons, in addition to those stated in prior sections, it is respectfully submitted that respondent's ability to retry, if not punish, on every count, each of the petitioners is not dependent upon the dual sovereignty doctrine and is fully consistent with pertinent federal principles of double jeopardy.

POINT IV

Recent decisions of this Court have not undermined the dual sovereignty concept embodied in *Bartkus* v. *Illinois*.

Contrary to the view expressed by petitioners, *Murphy* v. *Waterfront Commission*, 378 U. S. 52 (1964), in no respect represents a repudiation of the dual sovereignty concept articulated by the court a few years before *Bartkus*. Indeed, the configuration of the rule which emerged from *Murphy* was the direct result of the Court's punctilious recognition of the need to accomodate law enforcement interests of both the state and the federal sovereigns within its constitutional framework. *Id.* 378 U. S., at 79. More recently, in *Waller* v. *Florida*, 397 U. S. 387 (1970) the gravamen of the Court's decision was its determination that unlike the relationship between the states and the federal government, i.e., as separate sovereigns, a city is merely a subdivision of the state sovereign and cannot assert the prerogatives of separate sovereignty.

But even were *Bartkus* to lose some of its force, Mr. Justice Frankfurter's discussion of the effect of a bar on the states in bringing a second prosecution related to the federal prosecution would continue to be pertinent to the instant case. Mr. Justice Frankfurter pointed out that even in such a situation there must remain, for the trial court the knotty task ". . . of determining when the federal and state statutes are so much alike that a prosecution under the former bars a prosecution under the latter . . ." *Bartkus, supra*, 359 U. S. at 137.

Mr. Justice Frankfurter continued:

> "The proper solution of that problem frequently depends upon the gravamen of the state statute.

> It depends also upon an understanding of the scope of the bar that has been historically granted in the state to prevent successive state prosecutions. *Both of these problems are ones which the states are obviously more competent to handle than is this court." Ibid.* (emphasis supplied).

Likewise, respondent respectfully submits that this Court should not undertake such determination until the courts of New Jersey have had an adequate opportunity to make this judgment on a full record. Clearly at this juncture in the proceedings they have not had that opportunity.

CONCLUSION

For all of the foregoing reasons, respondent, State of New Jersey respectfully prays that the writs of certiorari sought in the above-named petitions pending before this Court not issue.

Respectfully submitted,

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